

# WHOOPS I MAY HAVE MADE A MISTAKE



## *COUNSEL'S CORNER*

In August 2004 Hazel Berry, Evelyn Mebane and Rebecca Robinson entered into a contract to sell 176 acres in Scurry County, Texas to Cynthia Gail for \$80,000. The contract reserved to the sellers all minerals and royalties. When the deal closed in September 2004, however, the deed did not contain a mineral reservation. It appeared to be an oversight as the attorney who prepared the contract and the deed did not compare the two.

One of the sellers sued Gail, claiming a legal theory of “*mutual mistake*,” and asked that the court reform the deed by adding the mineral reservation effective as of the date of closing. The trial court agreed. Cynthia Gail appealed.

Gail’s testimony was that: (a) this is not a case of mutual mistake; (b) contract negotiations continued after the contract was signed; (c) Gail believed that the contract would be later amended; (d) although the contract contained a mineral exception, in actuality there was no definitive agreement on that point; and (e) Gail believed the absence of a mineral reservation in the deed meant that the Sellers had agreed to amend the contract to remove the mineral reservation.

Gail also submitted an Affidavit, generally claiming that the absence of a mineral reservation in the deed was not a mistake, but rather reflected the intent of the parties.

The Texas Court of Appeals had little difficulty dismissing all of Gail’s arguments, relying instead on the legal principle that a party is entitled to reformation of a deed when it proves that it reached an agreement with the other party, but the deed does not reflect the true agreement due to mutual mistake. Unilateral mistake by one side (Berry and Mebane), and knowledge of that mistake by the other side (Gail), is equivalent to mutual mistake.

The contract contained a mineral reservation. The deed did not. The lawyer who failed to insert the reservation in the deed testified that it was an inadvertent failure. A scrivener’s failure to follow the precise terms of a contract equals a mutual mistake. Judgment affirmed for Mebane and Berry.

Gail v. Berry; 11-09-00299-CV (11<sup>th</sup> Texas Court of Appeals, decided April 16, 2011).

### Lessons learned:

1. Everybody makes mistakes.
2. Lawyers make mistakes.
3. Mutual mistakes can be corrected. Unilateral mistakes cannot.

Stuart A. Lautin, Esq.\*  
Counsel to North Texas Commercial Association of REALTORS®, Inc.

\* Board Certified,  
Commercial (1989) and Residential (1988) Real Estate Law,  
Texas Board of Legal Specialization  
Higier Allen & Lautin, PC  
5057 Keller Springs Road, Suite 600  
Addison Texas 75001  
P: 972.716.1888  
E: [slautin@higierallen.com](mailto:slautin@higierallen.com)  
W: [www.higierallen.com](http://www.higierallen.com)